

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
CENTRE UNIFIED SCHOOL DISTRICT #397)	File No. BPLIF-19911213DG
)	
For Authority to Construct and Operate)	
An Instructional Television Fixed)	
Service Station at Durham, Kansas)	
)	

ORDER ON RECONSIDERATION

Adopted: September 22, 2003

Released: September 24, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* In this *Order on Reconsideration*, we address a petition for reconsideration filed on December 21, 1992 by Centre Unified School District #397 (Centre).¹ Centre seeks reconsideration of an action by the Distribution Services Branch (Branch) of the Video Service Division of the former Mass Media Bureau dismissing the above-captioned application (Application) for authority to construct a new Instructional Television Fixed Service (ITFS) station at Durham, Kansas.² For the reasons stated herein, we deny the Petition.

2. *Background.* ITFS stations are intended primarily to distribute formal educational and cultural information in aural and visual form.³ ITFS licensees make use of the spectrum to provide formal classroom instruction, distance learning, and videoconference capability to a wide variety of users.⁴ In 1998, the Commission adopted technical rule changes designed to provide ITFS licensees flexibility to employ digital technology in delivering two-way communications services including high-speed and high-capacity data transmission and Internet service on a regular basis.⁵

3. On December 13, 1991, Centre filed the Application seeking to operate a new Instructional Television Fixed Service (ITFS) station in Durham, Kansas, utilizing D Group channels.⁶ On November 20, 1992, the Branch denied Centre's Application.⁷ The Branch determined that the

¹ Petition for Reconsideration (filed Dec. 21, 1992) (Petition).

² Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Service Division, Mass Media Bureau, Federal Communications Commission, to Centre USD #397 (Nov 20, 1992) (Dismissal Letter).

³ 47 C.F.R. § 74.931.

⁴ *Id.*

⁵ See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112 (1998).

⁶ File No. BPLIF-19911213DG. The D Group channels are located at 2554-2560 MHz, 2566-2572 MHz, 2578-2584 MHz and 2590-2596 MHz. See 47 C.F.R. § 74.902(a).

⁷ See Dismissal Letter.

Application violated Section 74.903(a)(1) of the Commission's Rules⁸ because Centre's proposed facilities would not meet the required 45 dB desired-to-undesired (D/U) signal ratio protection with respect to authorized receive sites of Station WLX562,⁹ Salina, Kansas, licensed to the North American Catholic Educational Programming Foundation, Inc. (NACEPF).¹⁰ On December 21, 1992, Centre filed the Petition. On June 22, 2000, Nucentrix Spectrum Resources, Inc. (Nucentrix) filed a supplement to the Petition consisting of a letter of no objection from NACEPF.¹¹

4. Discussion. Centre contends that the Branch erred in failing to consider its proposal to use frequency offset and that no harmful interference would occur.¹² Centre argues that its proposal is acceptable because it uses frequency offset and maintains a D/U signal ratio of at least 28 dB.¹³ In this regard, it interprets the *Wireless Cable Reconsideration Order* as stating that the Commission would consider frequency offset proposals on a case-by-case basis, even if the existing licensee did not consent to the use of frequency offset.¹⁴ Centre criticizes the Branch for failing to engage in that case-by-case analysis with respect to the Application.¹⁵

5. Based upon the record before us, we conclude that Centre's Petition should be denied. Section 74.903(a) of the Commission's Rules requires an ITFS applicant to provide an interference analysis, including a free space calculation to determine that the D/U signal ratio is 45 dB or greater to avoid co-channel interference.¹⁶ While Centre contends that its proposal to use frequency offset is consistent with the *Wireless Cable Reconsideration Order*, we believe that Centre has misinterpreted that decision. In the *Wireless Cable Reconsideration Order*, the Commission concluded:

We agree . . . that a 45 dB demonstration should still be required for . . . co-channel stations, unless there is a voluntary agreement between affected . . . station licensees to employ a frequency offset technique. Instead of adopting a separate standard

⁸ 47 C.F.R. § 74.903(a)(1).

⁹ The receive sites: Sacred Heart Jr./Sr. High, St. Mary's School, Benedictine College, Sacred Heart Elementary School, Salina Seventh Day Adventist, and Emmanuel Christian School.

¹⁰ See Dismissal Letter.

¹¹ Letter from Scott D. Delacourt, Esq. to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Jun. 22, 2000) (Supplement).

¹² Petition at 1-2. On June 11, 1993, Centre filed another FCC Form 330, seeking "minor" modifications to its application, proposing to add three and delete five previously requested receive site locations. (See Engineering Statement, dated June 4, 1993, signed by David R. Hollowell, accompanying Centre cover letter, (filed June 11, 1993).) In the proceeding, other, minor modification and supplemental, information was provided. (See Letter, dated Dec. 1, 1992, from Leo I. George to Clay Pendarvis, Mass Media Bureau providing certification information (filed Dec. 14, 1992); Letter, dated March 16, 1993, from Rick Joyce, Esq., to Donna R. Searcy, Secretary, FCC, to provide information to make grid and associated programming documentation consistent (filed Mar. 22, 1993); FCC Form 330 dated Aug. 4, 1993 executed by Centre's Supt. of Schools, completed FAA Form 7460, and accompanying Centre cover letter (filed Aug. 5, 1993).)

¹³ Petition at 4-5, *citing* Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, Gen. Docket Nos. 90-54 and 80-113, *Order on Reconsideration*, 6 FCC Rcd 6764, 6769-70 ¶¶ 28-31 (1991) (*Wireless Cable Reconsideration Order*).

¹⁴ Petition at 4.

¹⁵ *Id.* at 5.

¹⁶ 47 C.F.R. § 74.903(b).

for frequency offset transmitters, on a case-by-case basis, we will review requests for proffer of frequency offset transmitters for involuntary transmitter upgrades as a method to meet established interference protection standards for . . . stations of 45 dB desired-to-undesired signal ratio for co-channel stations. However, it is not necessary to revise Sections 21.905(c) and 74.961(c) to implement this change.¹⁷

6. In 1995, the Commission further clarified:

We will assess demonstrations of a lack of harmful interference to authorized or previously-proposed co-channel . . . stations, on a case by case basis, when the subsequently-filing . . . application is proposing to use a frequency offset transmitter or when the authorized or previously-proposed . . . station already is authorized or proposes to use a frequency offset transmitter. However, in each instance, *at a minimum*, the application must contain: (1) an analysis showing the desired-to-undesired signal ratios, in addition to providing as a separate exhibit document: (2) a further analysis or demonstration that the applicant's proposed . . . station will provide the equivalent of protection from harmful interference to the authorized or previously-proposed co-channel . . . station, as would be provided to that authorized or previously-proposed station by the 45 dB desired-to-undesired signal strength ratio of Section 21.902(f). For example, an applicant may file a demonstration that the transmitters of both affected stations are designed with frequency tolerances to enable operation on a frequency offset basis which is equivalent to the 45 dB desired-to-undesired signal ratio standard. In the alternative, applicants may submit voluntary agreements or consent statements.¹⁸

7. Centre's Application did not comply with the minimum requirements established by the Commission. Centre did not submit an agreement or consent from NACEPF with the Application. While the application did provide a study showing that the D/U ratio at the receive sites of Station WLX652 was greater than 28 dB, Centre made no attempt to show that it would provide protection equivalent to the 45 dB co-channel interference protection standard.¹⁹ Instead, Centre incorrectly assumed that it could demonstrate interference protection merely by showing that the D/U ratio at the receive sites of Station WLX652 was greater than 28 dB.²⁰ The dismissal of Centre's Application is consistent with other cases in which applications have been dismissed for relying on frequency offset without making the requisite showing.²¹

8. Finally, we decline to consider the consent letter provided in the Supplement. Any supplements to petitions for reconsideration filed more than thirty days after public notice of the action for which reconsideration is sought must be filed with a motion seeking leave to accept the supplement.²²

¹⁷ *Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6770 ¶ 30. Although the case dealt with MDS, for analytical purposes, the Commission has treated MDS the same as ITFS, which is the service involved in the instant case. *See generally id.*

¹⁸ Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, Gen. Docket Nos. 90-54 and 80-113, *Second Order on Reconsideration*, 10 FCC Rcd 7074, 7092 ¶ 51 (1995) (emphasis added).

¹⁹ Application, Engineering Statement, Table 1.

²⁰ Application, Engineering Statement at 2. *See also* Petition, Technical Statement of Kathryn G. Tesh at 2.

²¹ *See, e.g., RuralVision Central Inc., Order on Reconsideration*, 12 FCC Rcd 21739, 21744 ¶ 11 (MMB VSD 1997).

²² 47 C.F.R. § 1.106(f).

In the instant case, a motion for leave to supplement the Petition was not filed. The Supplement therefore was clearly untimely and thus should not be subject to consideration at this time.²³

9. Even if the consent letter had been submitted with the Petition, we do not believe it would have been decisionally significant at this juncture. Section 1.106(c) of the Commission's Rules provides that we will accept a petition for reconsideration relying on facts not previously presented to the Commission only in one of three circumstances: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;²⁴ (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;²⁵ or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.²⁶ In this case, we find that none of these circumstances is present. Centre provides no explanation as to why it could not have obtained NACEPF's consent prior to filing the Application.

10. Further, we also conclude that consideration of the NACEPF consent letter at this time is not in the public interest. The Commission's Rules require applicants to submit consent letters from the affected parties with the original application.²⁷ Pursuant to Section 74.903 of the Commission's Rules,²⁸ an application for an ITFS station must protect previously proposed facilities from interference and will not be granted if interference is predicted to occur. Given that the filing of Centre's Application established a deadline for mutually exclusive applications, it is vital that applicants submit all necessary consent letters with the original application. Considering consent letters that were not filed at the same time as an original application was filed encourages the filing of incomplete applications. As the Commission has stated before:

[w]e cannot allow a party to "sit back" and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.²⁹

11. Significant to our decision is the fact that such consent letter was proffered over eight years after the subject application was filed. We believe that such a delayed proffer is inconsistent with the timeframe contemplated in the applicable provisions of the Commission's Part 74 rules regarding the substance of ITFS applications. We therefore decline to consider the NACEPF consent letter for all of the reasons stated herein.

²³ See Educational Television Association of Metropolitan Cleveland, *Memorandum Opinion and Order*, 18 FCC Rcd 15117, 15120 ¶ 8 (2003).

²⁴ 47 C.F.R. § 1.106(c)(1)(i).

²⁵ 47 C.F.R. § 1.106(c)(1)(ii).

²⁶ 47 C.F.R. § 1.106(c)(2).

²⁷ See, e.g., Guadalupe Valley Electric Cooperative, *Order on Reconsideration*, 11 FCC Rcd 7434, 7442-43 (1996); In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1465-66 (1994); Family Entertainment Network, Inc., *Order on Reconsideration*, 9 FCC Rcd 566, 567-68 n.10 (1994).

²⁸ 47 C.F.R. § 74.903.

²⁹ See Canyon Area Residents, *Memorandum Opinion and Order*, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

12. In sum, we find that Centre has failed to demonstrate that there are sufficient reasons for granting its request for reconsideration. We, therefore, deny Centre's Petition.

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 73.3566 of the Commission's Rules, 47 C.F.R. § 73.3566, the Petition for Reconsideration filed by the Centre Unified School #397 on December 21, 1992 IS DENIED.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
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